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No. 82-186

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-TWO

ERNEST WADERE SHAHID, JR.,
PETITIONER,

versus

STATE OF FLORIDA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO
THE DISTRICT COURT OF APPEAL, FIRST
DISTRICT, STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I WHETHER THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN SHAHID V. STATE IS IN EXPRESS CONFLICT WITH THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

II WHETHER FLA.R.CRIM.P. 3.172(i), WHICH REQUIRES A DEFENDANT TO SHOW THAT HE WAS PREJUDICED BY THE VIOLATION OF A PLEA BARGAIN, CIRCUMVENTS THE CONSTITUTIONAL SAFEGUARDS ERECTED BY THIS COURT IN ITS DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

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PRELIMINARY STATEMENT

References to the appendix filed by petitioner will be made by the symbol "A" followed by appropriate page number.

OPINION BELOW

The per curiam affirmance, without opinion, of the Florida First District Court of Appeal is reported at 415 So.2d 1368.

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3), or any other provision thereof, at least for purpose of determining whether to decline assumption thereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts the constitutional and statutory provisions involved as set forth on pp. 3-5 of petitioner's petition for writ of certiorari.

STATEMENT OF THE CASE

Respondent accepts petitioner's Statement of Fact as set forth in the petition with the exception of the allegation that the prosecutor admitted violation of the plea bargain. Respondent denies this. Further, respondent denies that the prosecutor "had the recommendation of Sam Brewer of the Okaloosa County sheriff's department included in the presentence investigation. . . ." Additional references to the facts will be made in the argument portion of this brief.

ARGUMENT I

I WHETHER THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN SHAHID V. STATE IS IN EXPRESS CONFLICT WITH THIS COURT'S DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

A. Petitioner seeks to raise a constitutional issue for the first time before this Court. At no time in any of the lower courts did petitioner raise the claim that the alleged violation of the plea-bargain agreement by the prosecutor was of constitutional dimension. In fact, the case of Santobello v. New York, 404 U.S. 257 (1971), was never cited in any of petitioner's briefs or pleadings filed in the state courts. In the joint appendix filed by petitioner this Court will not find a citation to Santobello v. New York.

Petitioner attempts to convert a simple finding of fact by a state court trial judge (A-64) into a viable federal constitutional issue. A similar effort was made

in Engle v. Isaac, ___ U.S. ___, 71 L.Ed.2d 783, 102 S.Ct. ___ (1982), and appropriately rejected as follows:

> While they attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondents' trials may have violated state law.

Id. at 796. If such a practice were permitted, then every erroneous decision by a state court on state law would likely find its way to this Court clothed as a federal constitutional question. Isaac, 71 L.Ed.2d, at 796, n. 21

Petitioner's failure to identify when and how the federal constitutional issue was raised in the lower court is a tacit admission that it is raised for the first time before this Court. Unless this Court is ready to depart from the rationale of Cardinale v. Louisiana, 394 U.S. 437 (1969), this is not permissible. In

Cardinale, the Court remarked in pertinent part as follows:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.

Id. at 438.

B. It is the position of respondent that the prosecutor did not breach the plea-bargain agreement. At the hearing on March 16, 1981, when the plea of nolo contendere was tendered and accepted, the plea-bargain agreement was spread on the record and for the convenience of the Court is quoted below:

> MR. DEWRELL: Yes sir. If it please the Court, pursuant to plea negotiations between myself with consent of Mr. Shahid and Mr. Brace of the office of the State Attorney, we have reached a negotiated plea as it relates to all charges, known or unknown, presently pending against Mr. Shahid.

That plea, as I understand it, is that Mr. Shahid will enter a plea of nolo contendere to Count 1 and Count 2 of the information, filed directly by the office of the State Attorney under date 16 March 1981. All other charges and all other criminal activity, known or unknown, on behalf of Mr. Shahid cccurring prior to the date of 16 March 1981 will not be pursued by the State of Florida in return for the plea they have entered in Count I and Count 2 of this information.

MR. BRACE: If it pleases the Court, perhaps we had better have a little clarification on that. It is agreed by the State that the two counts of delivery that are presently before this Court is scheduled for trial on April 13th of tbis year and will be dismissed upon acceptance of this Court of this plea, but any activities arising out of the investigation associated with this case that is presently before the Court will not be prosecuted. I have not intended to give Mr. Shahid carte blanche immunity from any criminal activity he may have been involved in prior to today's date that I have no knowledge of. I certainly don't intend for the Court to be under that impression.

MR. DEWRELL: It's my understanding that immunity from prosecution would extend not only to the two pending counts or the two counts that are presently

pending pursuant to a mistrial, but to any other criminal activity arising out of those particular transactions or the prosecution of those particular transactions including any lesser offenses therein. Is that correct?

MR. BRACE: Yes.

MR. DEWRELL: O.K. So what we are speaking of is transactional immunity for any charges or any matters arising out of the charges that Mr. Shahid has pending in Circuit Court in and for Okaloosa County, Florida.

JUDGE: Is that the position of the State and the Defense? Is that correct?

MR. DEWRELL: Yes sir.

JUDGE: I think the parties' positions have been pretty well stated on the record. The State's immuunity, of course, does not run to any criminal activity which he may or may not have been involved in that does not arise out the investigation or the charges that are presently pending or have been pending before this Court. Is that the agreement of the parties?

MR. BRACE: That is the intent of the State.

MR. DEWRELL: That is my understanding, Judge.

(A-4,5,6) Respondent finds nothing in the terms of the plea-bargain agreement requiring the prosecutor to stand mute at sentencing.

The colloquy quoted on pp. 6,7,8 of the petition is taken from the hearing at the time the pleas of nolo contendere were entered on March 16, 1981, not from the sentencing hearing subsequently held on April 10, 1981 at which the sentence was imposed. (A-26) At this hearing, the prosecutor did indeed stand mute, making no recommendation one way or the other to the trial judge as to what sentence, if any, should be imposed. The presentence investigation report supports this. (A-24)

Petitioner contends on p. 8 of the petition that following the alleged violation of the plea-bargain agreement the court did not affirmatively offer petitioner an opportunity to withdraw his plea. This is interesting because at this

point in the proceedings the pleas had only been tendered, not accepted by the trial judge. Rather than indicating a desire to withdraw his tendered pleas of nolo contendere, petitioner followed through by giving sworn testimony in support of the voluntariness of those pleas. (A-11-17) It was only after determining that the pleas had been freely and voluntarily entered that the trial judge accepted them. (A-17, line 24--A-18, line 3)

The allegation that petitioner was coerced into entering the nolo contendere plea found on p. 11 of the petition is interesting. If petitioner was coerced into entering the pleas of nolo contendere, then he lied under oath. Note the following:

> Q. The charges against you to which you are entering a plea is one count of trafficking in cocaine and one count of possession of hashish. The maximum sentence which this Court could impose upon you under those pleas

is 30 years for Count I and five years for Count 2, the maximum sentence therefore being 35 years which could be imposed. Do you understand that the actual sentence which will be imposed is at the sole discretion of this Court?

A. Yes sir.

Q. Have there been any threats, force, pressure or intimidation upon you in order to force you to plead nolle contendre?

A. No sir.

Q. Have there been any promises made to you other than in open Court today and as fully discussed in open Court?

A. No sir.

(A-13,14)

Petitioner's complaint that the prosecutor violated the plea-bargain agreement by including the arresting officer's recommendation therein is something made up out of whole cloth. A Florida prosecutor has no control over what goes into a presentence investigation report other than his own statement which

is set forth under the heading "Court Officials, Statement." (A-24) The compilation of such a report is done by an appropriate employee of the Florida Department of Corrections, Parole and Probation Services. See § 948.01(2), F.S. (1981). In the instant case, the presentence investigation report was compiled by Raymond K. McShane, Parole and Probation Supervisor. (A-25)

Petitioner has suffered no deprivation of due process, United States ex rel. Robinson v. Israel, 603 F.2d 635 (7th Cir. 1979), cert.denied, 444 U.S. 1019; the plea bargain as spread upon the face of the record was not broken, Williams v. Wainwright, 604 F.2d 404 (5th Cir. 1979); and the trial judge did not violate any plea-bargain agreement, Jones v. Petrovski, 631 F.2d 595 (8th Cir. 1980); petitioner is entitled to no relief from this Court.

II WHETHER FLA.R.CRIM.P. 3.172(i), WHICH REQUIRES A DEFENDANT TO SHOW THAT HE WAS PREJUDICED BY THE VIOLATION OF A PLEA BARGAIN, CIRCUMVENTS THE CONSTITUTIONAL SAFEGUARDS ERECTED BY THIS COURT IN ITS DECISION IN SANTOBELLO V. NEW YORK, 404 U.S. 257.

Again, petitioner presents this Court with an issue that was never raised in the courts below. No mention was made in any of the pleadings filed in the lower courts of Rule 3.172, Florida Rules of Criminal Procedure. In fact, the rule is not cited once in the joint appendix filed by petitioner.

In his argument under this point, petitioner assumes that he was denied relief in the state courts because of his failure to show prejudice. This is incorrect. Petitioner's motion to vacate sentence and to withdraw plea (A-62) was denied by the state court trial judge, not on the ground that petitioner had failed to show resultant prejudice, but on the ground

that there had been no breach of any plea-bargain agreement in the first instance. (A-64) Consequently, petitioner's argument that the cited rule collides with Santobello v. New York is fatally flawed.

A cursory reading of the rule will show that it has nothing to do with a breach of a plea-bargain agreement; it only requires that the trial judge address a defendant personally and determine, inter alia, that the defendant understand the complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result. Rule 3.172(c)(vii), Florida Rules of Criminal Procedure. Again, the consitutionality of the rule was never challenged in the lower courts and the issue presented to this Court for the first time is, in effect, a willful repudiation of this Court's decision in Cardinale v. Louisiana, supra.

CONCLUSION

The petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief for Respondent in Opposition to Mr. Joseph Lieb, Jr., Syprett, Meshad, Resnick & Lieb, P.A., 1900 Ringling Boulevard, P. O. Box 1238, Sarasota, Florida 33578, counsel for petitioner, by U.S. Mail, this _____ day of October 1982.

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of Counsel